

Ethics In Social Media

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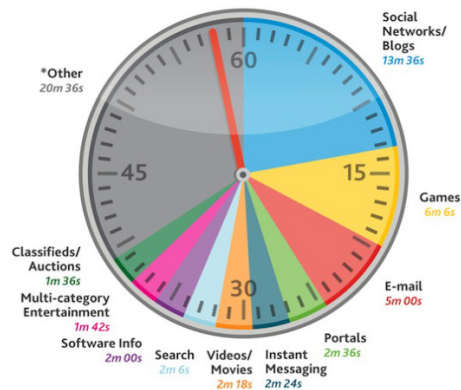
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Fun Facts

- More than a billion tweets are sent every 48 hours.
- Each day 350 million photos are uploaded to Facebook which equates to 4,000 photos per second.
- Every 60 seconds, 293,000 status updates are posted on Facebook.
- YouTube reaches more adults in the United States between the age of 18 and 34 than any cable network.
- If Wikipedia were a book it would be 2.25 billion pages.
- More than 45 million pictures are uploaded to Instagram every day.
- If Facebook were a country it would have the world's third largest population and twice the population of the United States.
- Brands and organizations on Facebook receive approximately 34,722 "likes" every minute.

Internet Usage

If all U.S. Internet time were condensed into one hour, how much time would be spent in the most heavily used sectors?



*Other refers to the 74 remaining online sectors visited from PCs/laptops

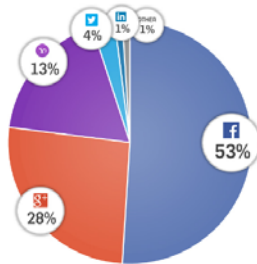
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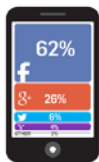
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Social Media Preference

SOCIAL LOGIN PREFERENCES



In the first quarter of 2014, Facebook saw a continued resurgence as an identity provider and maintained a majority of all logins. Google+/Google+, meanwhile, remained strong with nearly 30% of all logins. Yahoo, continued losing its share of logins, dipping 2% over last quarter.



MOBILE DEVICES

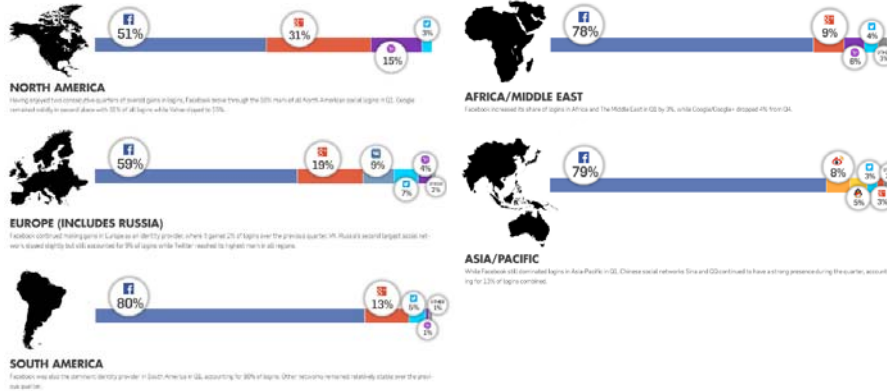
Facebook maintained its strong lead in mobile logins in Q1, while Google+/Google+ held onto a strong portion of logins as well. Giga expects Google+/Google+ logins to increase in mobile as Android devices evolve to include seamless Google+/Google+ authentication into native apps.

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Source: Giga

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Social Media Preference (continued)



Why are companies using social media?



Issues with Using Social Media

- **Labor and Employment**
 - Hiring and Firing
 - Employee Monitoring
 - Wage and Hour
 - Non-Solicitation
 - Harassment
 - Password Requests
 - Privacy
- **Commercial Issues**
 - Advertising/Brand Management
 - Antitrust Issue
 - Copyright and Trademark
- **Law Firm/Dept. Concerns**
 - Misconduct (Obtaining information fraudulently)
 - Confidentiality, Privacy and Privileged Information
 - Duty of Candor and Expertise Listings (Recommendations/online credentials)
 - Discovery
 - Competent Representation

Labor and Employment Concerns

Hiring and Firing

- Employers can benefit from the **lawful** use of information obtained from social media. Information discovered while viewing personal social media sites could be equated to questions asked in an interview.
- Areas to watch include *Race, Age, Religion, Marital Status, Sexual Preference, Pregnancy Status or Disability*.
- **Best practices:**
 - Screen applicants in a uniform manner.
 - Have a neutral party screen information.
 - Never create false personas to gain access to information.
 - Don't "friend" applicants in order to gain access to their non-public profiles.

Employee Website Monitoring

Employers should not forget their right or obligation to monitor and direct employees with regard to Internet use in the workplace or statements regarding the company.

Local Standards. Be aware of local country monitoring standards.

- Hong Kong – Require a filing.
- Italy – Can't use for background checks.
- Spain – Can monitor if warn.

Employee Website Monitoring (continued)

- Does the employer break the law by terminating an employee for submitting posts about the workplace to a social media website? The short answer is "Yes and No."
 - *Debord v. Mercy Health System of Kansas, Inc.*, 737 F.3d 642 (10th Cir. 2013), employer fired after accusing manager of sexual harassment in Facebook post. Trial court's decision that the employer acted lawfully when it fired the employee was upheld largely because the employee's Facebook posts did not amount to a legally protected complaint of sexual harassment.
 - A case ruled the use of the "like" button on social media is constitutionally protected speech. *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013).

Wage and Hour Concerns

Time spent promoting the employer's product or service through social media sites is most likely compensable "working time" under the FLSA and applicable state/local wage and hour laws.

Incorporation of these mediums and practices into an employer's overtime and time recording policies will help protect an employer from potential wage and hour issues.

Non-Solicitation

Non-Solicitation Agreements: Even if allowed to work for a competitor, an employee might have agreed not to solicit employees, customers and/or vendors of the former employer. Some employers are demanding that former employees unlink and de-friend their LinkedIn, Facebook and other social network contacts connected with the company.

- *Amway Global v. Woodward*, 744 F.Supp.2d 657 (E.D. Mich. 2010) affirmed an arbitrator's decision that a defendant ex-employee's untargeted blog and website postings violated his non-solicitation agreement.

Harassment

Beware of encouraging the use of social media.

- When a supervisor wants to be a subordinate's friend on a social networking site, it can create an awkward interaction between the supervisor and subordinate.
- If the subordinate accepts the invitation, the supervisor can see the subordinate's other friends, photos, "wall" postings, social activities, etc.
- If the subordinate doesn't accept the invitation, he or she may be concerned that his or her employment opportunities may suffer.

Password Requests

Recent Developments

- Legislation has been introduced or is pending in at least 28 states that prohibit employers from requesting passwords to personal Internet accounts to get or keep a job.
- In Tennessee, [H.B. 1852](#) failed. It would have created the Employee Online Privacy Act of 2014 which prevents an employer from requiring an employee to disclose the username and password for the employee's personal Internet account except under certain circumstances.

Recommendation

- Never force the access by requesting the username or password.
- Never force the connection by requesting friending.

Privacy and Confidentiality

- **Employee Privacy.** Employers must reduce employees' expectations of privacy in the workplace by clearly stating that employee social media use will be monitored. Courts have stated all social media is considered a public forum and therefore, no expectation of privacy.
- **Company Privacy and Business Confidences.** Regarding confidential and trade secret information, the issue of disclosure, both intentional and accidental, is enhanced through social media sites. In the "Twitter" world, where individuals feel compelled to describe every aspect of their day, the likelihood that they may, even unintentionally, leak confidential information about the company while describing their workday is of real concern. Employer's confidentiality and trade secret policies need to recognize and incorporate this medium, and employees must be put on notice and trained that such information is not to be discussed or disclosed without authorization.

Privacy and Confidentiality (continued)

- Restrictions on the distribution of "confidential" information. Companies have the right to require employees to keep confidential a good deal of information on business secrets, intellectual property and other similar information. But "personnel" information that addresses wages, hours, or terms and conditions of employment cannot be kept secret as part of a general ban on the dissemination of "confidential information."
- Confidential information in corporate policies, especially social media policies, **should be expressly defined to exclude general information on wages, hours, and terms and conditions of employment.**
- Policy must be narrowly tailored to the business needs, and can not sweep so broadly so as to interfere with employee rights under federal labor law.

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Employer Recap

What can an employer do?

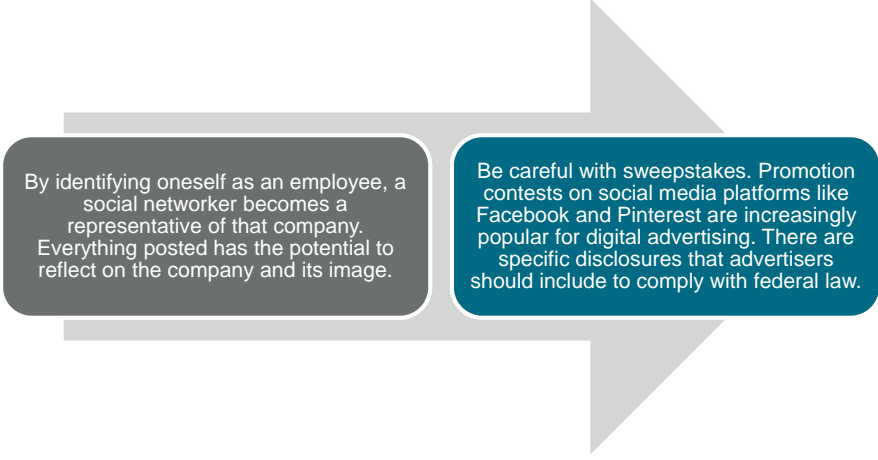
- Maintain consistent protocols to screen applicants' social media profiles and information regardless of their race, gender or other protected class status.
- Develop a basic understanding of the activities protected by the NLRA.
- Educate screeners/HR on the requirements of the Fair Credit Reporting Act and its state equivalents.
- Access private employee information resources only with proper employee authorization.
- Comply with the terms of use of all social media websites.
- Ensure that employment decisions are made with accurate information, as false and misleading information is prevalent in social media.
- Avoid retaliatory employment actions (terminations, demotions, etc.) against protected activities.

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Commercial Issues

Advertising and Brand Management



By identifying oneself as an employee, a social networker becomes a representative of that company. Everything posted has the potential to reflect on the company and its image.

Be careful with sweepstakes. Promotion contests on social media platforms like Facebook and Pinterest are increasingly popular for digital advertising. There are specific disclosures that advertisers should include to comply with federal law.

Antitrust Issues

Inquiries about salaries, what fees or prices are charged for a service or product, or discussion of vendors may lead to allegations of anti-competitive activities.

Include a provision in your policy regarding the enforcement of existing antitrust policies as well as a reminder not to communicate via social networking to make an anti-competitive agreement (such as price fixing or market allocation), share competitively-sensitive information, or disparage vendors, suppliers or other members.

Monitor social media channels to interrupt any illegal or inappropriate activity.

Copyright and Trademark Concern

Monitor corporate social media sites for infringement of a company's intellectual property:

1. Misuse of trademarks
2. Improper use of copyrighted material

Failure to police and take action = diminished value of IP rights

Monitor company's own site to prevent infringement of others' IP either by the company or third-parties that can post on the company's social media site

Copyright and Trademark Concern

NLRB

- Employees have the right to use company logos and trademarks in connection with discussions or protests over wages, hours or terms and conditions of employment.
- Examples include using pictures of company stores or products and using them in posts related to Section 7 "activities."
- ***Social media restrictions on the use of company logos or trademarks should state that the restriction does not apply to activities that could fall under Section 7.***

Who owns content posted to social media sites?

- Who owns user generated content?
 - Facebook and Instagram: You own the content you post, but we get a license to use it.
 - Twitter: You own what you tweet, but we get a license to use it.
 - LinkedIn: You own all of the content, feedback and information you provide, but you also grant us a non-exclusive license to use it.
- **Companies need to be careful that they don't post or use anything that they do not own.** Posting content that belongs to another person is copyright infringement.
- **Who owns the company account** should be included within a social media policy.

Protect Your Brand – Everyone Is A Critic!

- Gap, Inc. spent millions designing its new logo, but scrapped it after a groundswell of anger against the change, mostly on Twitter.
- Tropicana succumbed to criticism of its new carton and changed it back to the original.
- After Netflix raised its prices recently, many of the comments on its Facebook page were actually recommendations for competing services.
- Turn off comments on your website if you expect them to be critical.

Lawyer-Specific Issues

Misconduct (To Friend or NOT To Friend)

- **Lawyers, judges, litigants, others – "friending" online**
 - Lawyers and their agents CANNOT engage in social media communications with persons whom the lawyer knows to be represented by counsel.
 - This goes for judges, too: **Chace v. Loisel** (Jan. 2014) - Florida judge sent friend request to litigant in a divorce. After the request was ignored, judge ruled for the opposing party. Court of Appeal disqualified the judge.
 - Lawyers and their agents CANNOT use false pretenses to access non-public social media content.
 - Lawyers and their agents CAN view publicly available social media content.

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Misconduct (To Friend or NOT To Friend) (continued)

- **Judges and lawyers should be hesitant to be "friends" online**
 - In 2012, Florida's Fourth District Court of Appeal held that it was improper for a judge to "friend" attorneys.
 - California Judges Ass'n, Ethics Op. 66 – a judge may accept a lawyer as a Facebook "friend" or LinkedIn "contact" if that lawyer *may* appear before the judge, BUT NOT if the lawyer has a case pending before the judge.
 - ABA takes a more permissive, avoid-the-appearance-of-impropriety stance (Formal Op. 462, Feb. 2013).
 - Tennessee Judicial Ethics Op. 12-01 – "judges may participate in social media" but "must do so with caution and with the expectation that their use of the media likely will be scrutinized."

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Misconduct (To Tweet or NOT To Tweet) (continued)

- **Think Before You Tweet**

- In 2012, an attorney working for an appellate judge in Kansas was disciplined for tweeting about a disciplinary proceeding involving the state's former AG:
 - She lost her job.
 - She was informally admonished for violating Rule 8.4 of the Kansas Code of Professional Conduct for:
 - engaging in conduct involving dishonesty,
 - engaging in conduct prejudicial to the justice system,
 - implying an ability to influence an official
- And don't forget the advertising rules . . . see next slide!

Attorney Advertising Rules

- In Tennessee and elsewhere, lawyer and law firm websites are considered advertisements. Since social media profiles are websites, they too may be considered advertisements.
 - In 2013 and 2014, Florida went through a comprehensive re-working of the state's advertising ethics rules, specifically addressing lawyer and law firm websites, social networking and video-sharing sites.
 - PLAY IT SAFE - restrictions that apply to traditional forms of lawyer advertising will apply to social media

Attorney Solicitations/Inadvertent Creation of Attorney-Client Relationships

- Be careful of Facebook "friend requests" or LinkedIn "invitations" that offer to provide legal services to non-lawyers and may rise to the level of a prohibited solicitation.
- Be careful about inviting and responding to comments to a blog post, engaging in Twitter conversations or responding to legal questions posted by users on a message board or a law firm's Facebook page, which create a risk of inadvertently forming attorney-client relationships.
 - Disclaimers may help avoid inadvertent creation of attorney-client relationships.

Confidential and Privileged Information

Lawyers have a duty to protect confidential and privileged client information:

Get consent before posting client information on websites and blogs.

Be careful of geo-tagging metadata in photos and social media posts, for example, when traveling on confidential client business.

Possible exception: **Hunter v. VA State Bar** (VA 2013) - Virginia State Bar could not prohibit a lawyer from posting publicly available, non-privileged information about clients and former clients related to closed cases

Duty of Candor and Expertise

A lawyer shall NOT state or imply that a lawyer is an expert or a certified specialist unless the lawyer has been certified by an organization that is accredited by the ABA or the state bar.

This affects online credentialing and recommendations.

- Monitor LinkedIn and other online credentials and recommendations carefully for compliance with the Rules of Professional Conduct.
- Avoid "better," "the best," "expert," "specialized" or "certified."
- LinkedIn endorsements? Remove false or misleading ones.

Discovery

In 2013, 15% of companies had to produce social media postings in discovery. (*Norton Rose Fulbright Litigation Trends Survey*)

- 20% said they had to collect data from an employee's social media account in response to dispute or investigation.
- 41% said they had to preserve or collect data from an employee mobile device for litigation or investigation purposes.

Discovery

- ***In re Pfizer, Inc. Securities Litigation***, 288 F.R.D. 297 (S.D.N.Y. 2013) – Pfizer breached duty to preserve data from "e-rooms" (internal collaboration applications used by employees to share documents and calendars, archive emails and communicate via discussion boards and instant messaging).
- Social media managed by the company (i.e., company-owned blogs), should be included in litigation holds to avoid spoliation claims.
- A company may have to capture third-party social media data (Facebook, Twitter, etc.).
 - Both have self-help download data features
 - Vendors can help (tools that archive content)

Expectation of Privacy for Discovery

- ***Romano v. Steelcase Inc.*** NY trial judge ordered discovery of "private postings." No expectation of privacy. Everything is discoverable.
 - When someone posts on Facebook, Twitter, etc., that individual may give up the expectation of privacy, even if the messages were private messages or restrictions were set on a profile page.
- ***Robinson v. Jones Lang LaSalle Americas, Inc.*** Federal judge in Oklahoma wrote: "*I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms.*"

Expectation of Privacy for Discovery vs. "Right to be Forgotten"

In 2013, California enacted a law that would require social media sites to allow young registered users to erase their own comments.

A child can only erase his or her own statements, not the comments, "like" buttons, others' posts about those statements, or pictures of the child posted by others.

The Library of Congress is currently archiving public tweets on Twitter, and other third-party sites archive social media data. These sites are not covered by the California law.

In Camera Review

- Some judges have reviewed social media postings *in camera* prior to ordering production.
- At least one judge agreed to "friend" a litigant to conduct an *in camera* review:
 - **Barnes v. CUS Nashville, LLC**, No. 3:09-cv-00764 (M.D. Tenn.) - magistrate judge offered to expedite the parties' discovery dispute by creating a Facebook account and then "friending" two individuals "for the sole purpose of reviewing photographs and related comments *in camera*."

Direct Access to Social Media

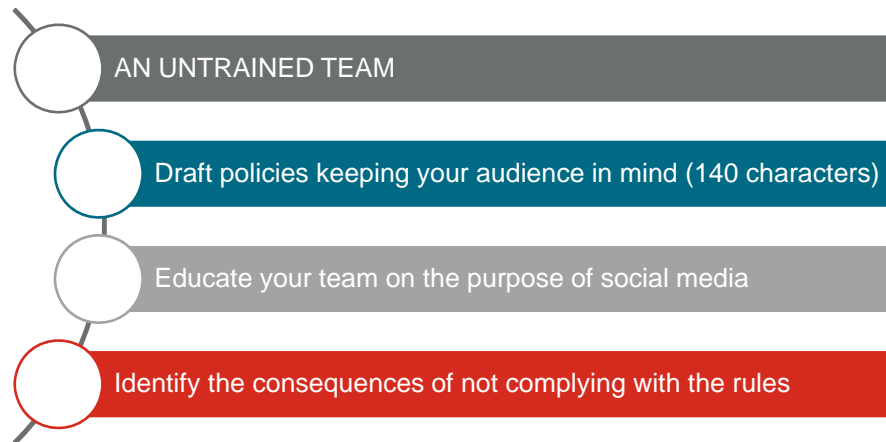
- Should courts allow litigants direct access to social media for discovery purposes?
 - **Largent v. Reed** (Pa. C.C.P. Nov. 8, 2011) - court ordered plaintiff to provide login information to defense counsel (not defendant).
 - **Trail v. Lesko** (Pa. C.C.P. July 3, 2012) - party's request for login information is *per se* unreasonable.
 - **Gatto v. United Airlines, Inc.** (D.N.J. Mar. 25, 2013) - plaintiff voluntarily provided Facebook password to defendants' counsel during settlement conference; plaintiff accidentally deleted account when Facebook warned of unauthorized access; plaintiff sanctioned for failure to preserve relevant evidence (adverse-inference instruction).

Competent Representation

As an attorney, if I don't include social media sites in my research, am I providing competent representation?

- Short answer - No
- As attorneys we can no longer ignore social media or deem it not relevant. But we must be careful in how we locate and use the information.

What is the greatest risk?



Resources

- Case Law – <http://blog.x1discovery.com/category/case-law/>;
<http://www.bna.com/social-media-law-blog/>
- NLRB Decisions – <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>
- Social Media Case Studies –
<http://www.simplyzesty.com/Blog/Article/March-2013/50-Social-Media-Case-Studies-You-Should-Bookmark>
- Fun Facts about Social Media –
<http://www.iacpsocialmedia.org/Resources/FunFacts.aspx>



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